C-PUNCH CORP.

IBLA 81-509 Decided September 29, 1982

Appeal from decision of Administrative Law Judge E. Kendall Clarke, dismissing the appeal of the decision of the district manager, Winnemucca District, Bureau of Land Management, requiring ear-tagging of appellant's domestic livestock. Nevada 2-80-7.

Affirmed.

1. Grazing Permits and Licenses: Generally

Implementation of the Taylor Grazing Act of 1934 is committed to the discretion of the Secretary of the Interior. Under 43 CFR 4120.4(d) BLM has discretionary authority to require ear-tagging to control unauthorized grazing use or to promote the orderly administration of public lands and a decision requiring that domestic livestock be ear-tagged will be sustained where the record establishes a rational basis therefor.

APPEARANCES: Robert G. Irvin, President, C-Punch Corporation, for appellant; James E. Turner, Esq., Office of the Regional Solicitor, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

The C-Punch Corporation (C-Punch) has appealed the decision of Administrative Law Judge E. Kendall Clarke dated March 18, 1981, dismissing an appeal from the decision of the district manager, Winnemucca District, Bureau of Land Management (BLM). Appellant protests the inclusion of a term in appellant's grazing license to the effect that any cattle found in its allotment without BLM ear tags shall be deemed to constitute an unauthorized grazing use. Appellant asserts that this exceeds the authority of BLM to order ear-tagging under 43 CFR 4112.3-2(a)(4) (1977) 1/ and violates appellant's right to a hearing prior to a determination of trespass violation.

1/ The grazing regulations were generally revised and recodified in 1978. 43 Fr 29067 (July 5, 1978). Authority for requiring ear-tagging in grazing management is now found at 43 CFR 4120.4(d).

Appellant was entitled to graze between 2,471 and 2,871 cattle in the Blue Wing and Seven Troughs allotments in the Winnemucca District during various times in 1980. On February 28, 1980, BLM issued a billing in the amount of $ 55,497.76 for appellant's use of the public domain. By a letter received in the Winnemucca District Office on March 18, 1980, appellant remitted the requested sum under protest stating:

> Since I assume this license constitutes a final decision of the District Manager under Title 43 of the Code of Federal Regulations, C-Punch Corporation hereby appeals from the following portion of said final decision:
>
> ". . . Any cattle owned or controlled by you found on the Blue Wing or Seven Troughs allotments without BLM issued ear tags will be deemed in excess of your authorized numbers and a violation of 43 CFR 4140.1(b)(1)."
>
> In support of this appeal, appellant alleges as follows:
>
> a. C-Punch only has an opportunity to tag its cattle during the spring and fall roundups. A certain number of tags are lost each year for various reasons.
>
> b. C-Punch anticipates some untagged yearlings will be found each year and has structured its license and paid for tags to cover these untagged yearlings during periods when we do not have access to the range.
>
> c. There are still a few untagged wild cattle on the range which we have never been able to capture but for which we have tags.
>
> The above cited language of the license exceeds the authority of the BLM to order ear-tagging under 43 CFR 4112.3-2(a)(4) [(1977)] to prevent trespass. The [objectionable] language seeks to eliminate the burden of proof required of the BLM in a trespass action and to allow the BLM to seek damages where no trespass exists.

In a letter responding to appellant, the acting area manager, Winnemucca District, BLM, explained:

> It is our contention that the range user has the responsibility to control his livestock on public rangelands in accordance with 43 CFR 4120.4(a) and ear tag all domestic livestock in accordance with the District Manager's Final Decision dated February 3, 1977.
>
> Your payment of the grazing license constitutes full acceptance of the grazing license and all terms and conditions attached and made a part of the permit to use public rangelands.

A hearing on the appeal was held before Administrative Law Judge Clarke on November 20, 1980, in Winnemucca, Nevada. The contention of appellant in

the statement of reasons for appeal from Judge Clarke's decision is that unavoidable circumstances may cause some of the cattle on the allotment to be untagged and that presuming such cattle to be in trespass would place an unfair burden of proof on appellant in any hearing regarding an alleged trespass.

[1] We find that the decision of Judge Clarke in this case must be affirmed. Implementation of the Taylor Grazing Act of 1934, as amended, 43 U.S.C. §§ 315, 315a-315r (1976) is committed to the discretion of the Secretary of the Interior. Andrew H. L. Anderson, 32 IBLA 123 (1977). The regulation appropriate to this case, 43 CFR 4120.4(d), gives authorized BLM officials the discretion to require "tagging of the authorized livestock in order to control unauthorized grazing use or in order to otherwise promote the orderly administration of the public lands." A decision made in the exercise of this discretion supported by a rational and defensible basis is not arbitrary or capricious and will be affirmed. Andrew H. L. Anderson, supra. We find that the BLM decision was reasonably related to the protection of public lands from unauthorized grazing and adopt Judge Clarke's conclusions as follows:

> The burden is upon the appellant to show by substantial evidence that a decision is improper or that he has not been dealt with fairly. Bert N. Smith, et al. v. Bureau of Land Management, 48 IBLA 385 (1980).
>
> Under the current grazing regulations, 43 CFR 4120.4(a), the permittee or lessee shall own or control be responsible for the management of the livestock which graze the public lands under a grazing permit or lease.
>
> Pursuant to the regulations, the district manager is granted discretionary authority to require ear tags on all cattle grazing on a particular allotment. This is justified on the basis of the need to keep an account of all authorized cattle allowed on the range. By setting forth the number of cattle allowed plus the corresponding number of ear tags needed for such cattle, a rather efficient method of visually surveying as to whether unauthorized cattle are on the range can be implemented. By this method all cattle on the range without proper ear tags are unauthorized. Under the regulations, 43 CFR 4140.1, cattle exceeding the authorized number may be subject to a civil or criminal penalty. In my opinion, what has been set forth in the grazing permit is no more than what is provided by the regulations. It has been merely pointed out and emphasized in the permits by the BLM officials.
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> I have taken into consideration the size and area of the Blue Wing and Seven Troughs grazing allotments. These allotments do cover a large area. However, the permittee is responsible for the management of his livestock on the federal range. I am aware of the difficulties for the appellant in rounding up his cattle, but these are the risks that he voluntarily takes when he seeks to obtain grazing privileges on the federal range. Even though

> there may be economic hardships because of the requirement of ear-tagging, administrative action which has the most severe economic implications to a particular licensee is not necessarily the product of abused discretion and may be permitted to stand. United States v. Charles Maher, et al., 79 I.D. 109, 5 IBLA 209 (1972). There may be alternative methods as recommended by the appellant and they may be reasonable. Nonetheless, it is not appropriate to revise a decision reached in the exercise of discretionary authority (in this case the requirement that all cattle be ear-tagged) merely because there is more than one legitimate point of view on the subject. Andrew H. L. Anderson, ET AL., 32 IBLA 123, 127 (1977).

I find there has been no abuse of discretion in the requiring of ear tags on the subject allotment and that this appeal lacks merit and therefore is dismissed. Furthermore, I find the appellant's argument that he will not be granted adequate procedural safeguards prior to the determination of whether untagged cattle owned by him are found in trespass to be without merit. The departmental regulations concerning alleged violations, 43 CFR 4160, provides for a hearing prior to the imposition of sanctions for trespass.

Clearly the rationale for requiring ear tags is to facilitate range management through control of unauthorized grazing use. See Andrew H. L. Anderson, supra. The statement on the grazing license to which appellant objects is nothing more than a statement of the obvious--that the presence on the range of untagged livestock is evidence of unauthorized use. This does not constitute conclusive proof of trespass. Such evidence would be subject to rebuttal or explanation. A witness for BLM acknowledged at the hearing that cattle sometimes lose ear tags on the range (Tr. 38). The burden of proof in a grazing trespass hearing is unaltered. Reliable, probative, and substantial evidence, developed at a hearing where the opportunity to testify and cross-examine witnesses is provided, is required to support a finding of a grazing trespass by an Administrative Law Judge. Bureau of Land Management v. Babcock, 32 IBLA 174, 84 I.D. 475 (1977).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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C. Randall Grant, Jr.
Administrative Judge

We concur:

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Edward W. Stuebing
Administrative Judge

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Gail M. Frazier
Administrative Judge